Supreme Court, U.S.
FILED
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No. _____

In The

Supreme Court of the United States

October Term, 1992

ROBERT A. MINES, CAROLYN J. HOWARD, GARY ROBERTS, and a class of persons similarly situated,

Petitioners,

v.

DONNA SHALALA, Secretary of the Department of Health and Human Services,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the Appeals Council of the Social Security Administration may reopen an Administrative Law Judge's decision for an error of law after the sixty-day review period has passed.

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ROBERT A. MINES, CAROLYN J. HOWARD, GARY ROBERTS, and a class of persons similarly situated,

Petitioners,

v.

DONNA SHALALA, Secretary of the Department of Health and Human Services,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

Robert A. Mines, Carolyn J. Howard, and Gary Roberts, on behalf of themselves and all others similarly situated, petition for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-8a) is reported at 981 F.2d 1068. The opinion and order of the district court (App. 9a-17a) is unreported.

JURISDICTION

The judgment and opinion of the court of appeals was entered on December 15, 1992. The jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1).

REGULATORY PROVISIONS INVOLVED

1) Section 404.988 of Title 20, Code of Federal Regulations, states in relevant part as follows:

> **Conditions for reopening.**
>
> A determination, revised determination, decision, or revised decision may be reopened –
>
> * * *
>
> (b) Within four years of the date of the notice of the initial determination if we find good cause, as defined in § 404.989, to reopen the case. . . .

2) Section 404.989 of Title 20, Code of Federal Regulations, states as follows:

> **Good cause for reopening.**
>
> (a) We will find that there is good cause to reopen a determination or decision if –

(1) New and material evidence is furnished;

(2) A clerical error in the computation or recomputation of benefits was made; or

(3) The evidence that was considered in making the determination or decision clearly shows on its face that an error was made.

(b) We will not find good cause to reopen your case if the only reason for reopening is a change of legal interpretation or administrative ruling upon which the determination was made.

3) Section 416.1488(b) of Title 20, Code of Federal Regulations, states in relevant part as follows:

Conditions for reopening.

A determination, revised determination, decision, or revised decision may be reopened –

* * *

(b) Within two years of the date of the notice of the initial determination if we find good cause, as defined in § 416.1489, to reopen the case. . . .

4) Section 416.1489 of Title 20, Code of Federal Regulations, states as follows:

Good cause for reopening.

(a) We will find that there is good cause to reopen a determination or decision if –

(1) New and material evidence is furnished;

(2) A clerical error in the computation or recomputation of benefits was made; or

(3) The evidence that was considered in making the determination or decision clearly shows on its face that an error was made.

(b) We will not find good cause to reopen your case if the only reason for reopening is a change of legal interpretation or administrative ruling upon which the determination was made.

STATEMENT

1. Petitioners are elderly or disabled individuals who received favorable decisions from administrative law judges (ALJs) which were reversed, months or years later, by the Appeals Council of the Social Security Administration for alleged errors of law. The issue at stake revolves around the finality of these decisions, which authorize payment, under the Social Security Act, of Social Security (Title II), Supplemental Security Income (Title XVI), and Medicare (Title XVIII) benefits.

Although there are separate regulations governing Medicare, Social Security and Supplemental Security Income, the regulatory scheme is essentially the same. Once an ALJ decision is made, the Appeals Council may seek review of the decision by notifying the claimant within sixty days of its intent to review. Explicitly stated as a ground for this review is "an error of law." 20 C.F.R. §§ 404.970(a)(2), 416.1470(a)(2). Failure to seek review renders the decision of the administrative law judge, according to the regulations, binding on all parties to the hearing. 20 C.F.R. §§ 404.955, 416.1455.

None of the petitioners' cases challenged herein were reviewed for error of law within the 60-day period provided for in the regulations. Rather, each case was reopened significantly later, based upon another regulatory provision which allows reopening, for up to several years, where the Appeals Council finds "good cause." 20 C.F.R. §§ 404.988(b), 416.1488(b). The term "good cause" is narrowly defined in the regulations to include several discrete circumstances. Only one is at issue here, that which allows for reopening "if the evidence that was considered in making the decision clearly shows on its face that an error was made." 20 C.F.R. §§ 404.989(a)(3), 416.1489(a)(3).

Petitioners claim that this good cause exception refers only to factual errors, apparent on the face of the evidence, and does not include legal errors. The Secretary of Health and Human Services, however, treats this exception to include legal errors. This interpretation is so expansive that it swallows up the general rule of finality, making virtually every ALJ decision subject to review months or years later. The eight courts of appeals which have considered this issue are split, with four agreeing with the Secretary's interpretation of the regulations and four disagreeing.

2. Petitioners' initial applications for benefits and ALJ decisions were made as long as thirteen years ago. Gary Roberts was awarded disability benefits under both Title II and SSI in March 1980. The Appeals Council reevaluated his disability status and decided that his disability ceased in January 1982, and that, accordingly, his period of entitlement to benefits ended in March 1982. App. 3a.

On July 30, 1982, an ALJ determined that federal law required maintenance of Mr. Roberts' eligibility through the second month following the month in which his vocational rehabilitation ended, namely, July 1982. Further, the ALJ determined that he was entitled to an extended period of eligibility through August 1984. App. 3a. No review of this decision was sought by the Appeals Council within 60 days pursuant to 20 C.F.R. §§ 404.970(a)(2) or 416.1470(a)(2).

Rather, on June 27, 1985, nearly three years after the ALJ's favorable ruling, the Appeals Council issued a notice stating its intention to reopen pursuant to 20 C.F.R. § 404.989(a)(3) because the ALJ had misinterpreted the regulations. The Council later ruled that Mr. Roberts' entitlement ended in May 1982. App. 3a-4a. The Appeals Council's decision was upheld by the district court over nine years after his initial favorable decision was issued. See App. 17a.

Carolyn Howard applied for Title II and SSI benefits as a disabled child in January 1982. She received a favorable decision from an ALJ in March 1983. A year later, in March 1984, the Appeals Council reopened and vacated the ALJ's decision, remanding to a new ALJ for an evaluation of the record to determine whether she was disabled. The new ALJ ruled against her in January 1985. She sought review by the Appeals Council within sixty days of the second decision. The Council denied review in June 1985, three years after her initial application and two years after her favorable decision. App. 3a.

Robert Mines' first application for Title II and SSI benefits was approved by an ALJ, but later rejected by the

Appeals Council, which properly reviewed the decision within the 60-day period provided for pursuant to 20 C.F.R. §§ 404.969, 404.970, 416.1469, 416.1470. Mr. Mines did not appeal. Six months later he filed a new application for disability, and was found eligible by a different ALJ on June 25, 1984. The Appeals Council did not review the second decision within the 60-day period. Instead, several months later, on September 25, 1984, the Council reopened the decision pursuant to 20 C.F.R. § 404.989(a)(3), stating that the second ALJ had "invaded" the jurisdiction of the Appeals Council by establishing the onset date of disability back to a point already rejected by the Appeals Council. Six months later, on March 22, 1985, the Appeals Council reversed *in full* the decision of the second ALJ. App. 2a-3a.

Thus, not only did the Appeals Council reject the disability onset date approved by the second ALJ, the issue for which it had purported to reopen the case, but it also rejected the determination that Mr. Mines was disabled at a point in time after the Appeals Council had rejected his initial application for benefits. On that issue, of course, the ALJ could not have "invaded" the jurisdiction of the Appeals Council's original decision, because the Appeals Council did not and could not have considered the disability at the later date. Nevertheless, the Appeals Council employed the reopening regulations to review and reverse that part of the ALJ's decision as well, months after the normal 60-day period for review had passed.

3. On May 28, 1985, plaintiff Robert Mines filed a complaint challenging the Appeals Council's action in reopening his case for legal error. Later that year an

amended complaint was filed with both Mr. Mines and Ms. Howard as named plaintiffs, seeking to proceed on behalf of a nationwide class of individuals who have been subjected to the Appeals Council's reopening policy. Declaratory and injunctive relief terminating the policy was sought. On November 18, 1986, Gary Roberts was allowed to intervene in the case.

On February 2, 1987 plaintiffs moved for class certification and for summary judgment. In their summary judgment motion, plaintiffs argued: (1) that only the claimant and not the Appeals Council was permitted to reopen under the applicable regulations, (2) that reopening by the Appeals Council violated due process, and (3) that if it were permissible for the Appeals Council to reopen, it could not do so for errors of law. Almost two and a half years later, on June 21, 1989, the district court ruled. Only one of the plaintiffs' contentions, listed above as the first of plaintiffs' arguments, was addressed in the district court's decision. The court held that the Appeals Council was permitted, under the regulations, to initiate reopening. App. 15a-16a. Having rejected plaintiffs' case on the merits, the district judge then denied the motion for class certification as moot. App. 16a.

Plaintiffs filed a motion for reconsideration reiterating the issues not addressed in the court's ruling. The motion was deemed submitted on the briefs on July 31, 1989, but was not ruled upon for more than a year, on October 10, 1990, when the court denied the motion without discussion.

4. Plaintiffs filed a timely notice of appeal on November 29, 1990. After it was briefed and argued, the

Ninth Circuit issued its decision on December 15, 1992, holding that legal error may constitute good cause for reopening.

In his opinion for the court, Judge Trott noted that "[t]he circuits are split on this issue." App. 4a. His decision reviewed the regulations which authorize the Appeals Council to initiate direct review of an ALJ's disability decision within sixty days for errors of law. 20 C.F.R. §§ 404.970(a)(2), 416.1470(a)(2). Additionally, the court analyzed the regulations which authorize the Appeals Council to "reopen" a case after sixty days for good cause.

The court noted that "good cause" for reopening, as it is relevant to this decision, exists if "the evidence that was considered in making the determination or decision clearly shows on its face that an error was made." 20 C.F.R. §§ 404.989(a)(3), 416.1489(a)(3). App. 5a. The court rejected petitioners' contention that " 'errors on the face of the evidence' allows reopening after the 60 day review period . . . only when *factual* errors appear in the record." App. 5 (emphasis in original; footnote omitted). It based this conclusion on the Social Security Administration's Programs Operation Manual System (POMS) and on the Eighth Circuit's interpretation of the regulations. App. 7a-8a.

REASONS FOR GRANTING THE PETITION

1. The decision below permits the Appeals Council to reopen a decision favorable to a claimant months or years after the normal 60-day review period is over, and

to revise the decision based upon the Council's different view of the law. This puts the thousands of elderly and disabled people who have received a favorable decision from an ALJ – of whom many have already waited years for the decision – in limbo as to their right to benefits.

Although supported by the results in three other circuits, the decision below is in conflict with four other appellate court decisions, which have recognized that the Secretary's policy defies traditional notions of jurisprudence, in particular those which promote finality in the law. First, in direct contradiction to the court below, the Second and the Seventh Circuits have expressly determined that the Appeals Council may not reopen a case after the 60-day period for legal error. *Gutierrez v. Bowen*, 898 F.2d 307 (2d Cir. 1990); *Hale v. Sullivan*, 934 F.2d 895 (7th Cir. 1991). The Second Circuit held that it was impermissible for the Appeals Council to reopen the case simply because it believed that the ALJ's decision was legally incorrect:

> Even assuming that the ALJ did fail to consider the evidence cited by the Appeals Council, none of the evidence "shows on its face that an error was made." Rather, the cited evidence provides a basis upon which to challenge the credibility determinations of the ALJ. The Appeals Council clearly disagreed with the ALJ's conclusion that Maria Gutierrez's testimony was credible, but none of the cited evidence alone or taken together, "clearly shows on its face" that the ALJ's finding was in error.

Gutierrez, 898 F.2d at 311-12.

The Seventh Circuit also concluded that good cause for reopening does not encompass revisiting the legal basis of the ALJ's decision:

> The district judge concluded that the Appeals Council possessed good cause to reopen Hale's case because he believed the case involved simply a recomputation of benefits. But the Appeals Council's decision was not founded upon a clerical error in the computation of benefits or an error on the face of the evidence. Instead, the Appeals Council re-assessed the ALJ's findings and issued its own determination that Hale was not disabled. This type of change in administrative judgment does not amount to good cause to reopen a case under the regulations.

Hale, 934 F.2d at 897; see also *Koolstra v. Sullivan*, 744 F.Supp. 243, 246-247 (D.Colo. 1990) (holding that alleged error in the interpretation of the law does not provide good cause for reopening).

Thus, two circuits have found, in direct opposition to the court below, that only factual, and not legal, error may form the basis for a good cause reopening of an ALJ decision beyond the 60-day review period.

In addition, the Eleventh Circuit has adopted a "component analysis" by which only the ALJ may reopen an ALJ decision; the Appeals Council, it held, does not have the power to reopen ALJ decisions after more than sixty days. *Butterworth v. Bowen*, 796 F.2d 1379, 1389 (11th Cir. 1986). The court rejected the Secretary's contention that her powers of review would thus be too narrowly proscribed, noting that the Appeals Council will still be able

to review ALJ decisions and that ALJs will be able to reopen their own decisions. *Ibid.*

Furthermore, the First Circuit interprets the regulations to prohibit the Appeals Council from reopening after the 60-day review period on the ground that to do so would violate the guarantees of due process. *McCuin v. Secretary of Health and Human Services*, 817 F.2d 161 (1st Cir. 1987). That court pegged its decision squarely on the violation of finality principles which the Appeals Council's practice occasioned, as the reopening power

> takes away the finality that adjudication normally affords. This lack of finality, essentially a problem of substantive due process, spawns a problem of procedural due process: the impossibility of giving Medicare recipients fair notice of the Secretary's intentions.

McCuin, 817 F.2d at 172; see also *DeLong v. Heckler*, 771 F.2d 266, 268 (7th Cir. 1985) (dictum indicating that right to reopen should be limited to claimants); *Weinstein v. Bowen*, 666 F.Supp. 1131, 1134-36 (N.D.Ill. 1987) (adopting the *McCuin* due process analysis).

The First Circuit's analysis is also consistent with several circuit decisions dealing with related due process issues in the context of the Appeals Council's right to reconsider ALJ decisions. The Third Circuit relied on the *McCuin* case to conclude that, once the 60-day period during which the Appeals Council may itself decide to review a hearing decision has expired, it cannot delve into any issues not appealed by the claimant herself. *Chrupcala v. Heckler*, 829 F.2d 1269, 1273 (3d Cir. 1987). In so holding the Third Circuit also recognized the critical importance of finality in administrative decision-making:

> Our decision today respects the important concept of finality which, "as embodied in such doctrines as collateral estoppel and res judicata, is '[a] fundamental precept of common law adjudication, . . . ' " *McCuin*, 817 F.2d at 172 (quoting *Montana v. United States*, 440 U.S. 147, 153 . . . (1979)).

Ibid. Similarly, both the Eleventh and the Third Circuits have held that, when the claimant initiates review, the Appeals Council must give notice of its intent to revisit any issue not challenged by the claimant. *Kennedy v. Bowen*, 814 F.2d 1523, 1526 (11th Cir. 1987); *Powell v. Heckler*, 789 F.2d 176, 178 (3d Cir. 1986) ("[t]he courts, to protect due process, must be particularly vigilant and must hold agencies, such as the Social Security Administration, to a strict adherence to both the letter and the spirit of their own rules and regulations"); *Bivines v. Bowen*, 833 F.2d 293, 296-297 (11th Cir. 1987); *Everhart v. Bowen*, 694 F.Supp. 1518, 1520-21 (D.Colo. 1987). The logic of these decisions is again imbued with the assumption that notions of fundamental fairness and administrative finality preclude an agency from taking unilateral action after the time for review has passed.

Thus, in addition to the First Circuit's express holding that due process guarantees prohibit the Appeals Council from reopening ALJ decisions, one other circuit court has agreed with that analysis in dictum, and several other courts have similarly relied on due process grounds in restricting the ability of the Appeals Council to undermine administrative finality.

In sum, four circuits agree that the Secretary's interpretation of the reopening regulations is in error, and have restricted the Appeals Council's right to reopen

beyond the 60-day review period in varying degrees. On the other hand, three other circuits are in accord with the decision below and allow the Appeals Council to reopen for legal error after sixty days have passed. *Sheppard v. Sullivan*, 906 F.2d 756, 759 (D.C.Cir. 1990); *Fox v. Bowen*, 835 F.2d 1159, 1163-64 (6th Cir. 1987); *Munsinger v. Schweiker*, 709 F.2d 1212, 1215-16 (8th Cir. 1983). In the first of these to issue, the Eighth Circuit reviewed the language of the Social Security Claims Manual, and held that the Secretary's interpretation of the regulations to permit reopening for legal errors is not inconsistent with those regulations. The Sixth and the D.C. Circuits adopted the *Munsinger* approach without further analysis. *Fox*, 835 F.2d at 1163-64; *Sheppard*, 906 F.2d at 759. Likewise, the court below simply relied on the POMS (the successor to the Claims Manual) and on *Munsinger* to reach the same conclusion. App. 7a-8a.

Thus, the appellate court decisions are split in their outcomes, and diverse in their reasoning and application. A decision from this Court would provide a uniform rule and a standard equally applicable to the thousands of cases nationwide which are potentially affected by the Appeals Council's practice.

2. Above and beyond the lack of national uniformity which now exists on this point, it is important for the Court to consider this issue because it affects the finality of thousands of decisions authorizing coverage for the elderly and disabled. Furthermore, the issue directly implicates the critical concepts of fairness of process and finality upon which the system of jurisprudence itself is premised.

The rule upheld below allows for the reopening of a favorable benefit decision, several years later, as a result of legal error. This interpretation renders meaningless the review procedure, which expressly permits a review of these decisions within sixty days for legal error. If reopening is allowed for both factual and legal error, there is no case for which reopening could not occur. "Good cause" has been transformed into "any cause," and the narrow exception has become a rule which extends for years the Appeals Council's power to reverse ALJ decisions with which it is dissatisfied.

Thus, the elderly or disabled recipient of a favorable ALJ decision is placed in a state of limbo. Without finality to the process, she must either hold the benefits in escrow or spend them with the knowledge that she may be subject to an overpayment collection later – if the Appeals Council decides to reopen. The harm and insecurity imposed on these vulnerable members of society is only surpassed by the violation of traditional precepts of fairness and finality which the Appeals Council's practice causes.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

JEANNE FINBERG
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March 1993

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROBERT A. MINES; CAROLYN J. HOWARD; GARY ROBERTS, and a class of persons similarly situated, *Plaintiffs-Appellants,* v. LOUIS W. SULLIVAN*, Secretary of the Department of Health and Human Services, *Defendant-Appellee.*	No. 91-55034 D.C. No. CV-85-3565-TJH OPINION

Appeal from the United States District Court
for the Central District of California
Terry J. Hatter, Jr., District Judge, Presiding

Filed December 15, 1992

Before: Jerome Farris, Edward Leavy, and Stephen S. Trott, Circuit Judges.

OPINION

TROTT, Circuit Judge:

The issue in this case is whether the Appeals Council of the Department of Health and Human Services

* Louis W. Sullivan is substituted for his predecessor, Otis R. Bowen, M.D., as Secretary of Health and Human Services. Fed. R. App. P. 43(c)(1).

("Appeals Council") may reopen a decision of an Administrative Law Judge ("ALJ") for errors of law pursuant to 20 C.F.R. §§ 404.988, 404.989, 416.1488, and 416.1489 (1992), or whether reopening under these sections is limited to addressing errors of fact. The district court granted the Appellees motion for summary judgment and held the Appeals Council could reopen a final decision of an ALJ for errors of law under these sections. We have jurisdiction over this timely appeal pursuant to 28 U.S.C. § 1291 (1988). We affirm.

I

Appellants are three individuals, each of whom received favorable decisions from ALJs which were reversed by the Appeals Council when it reopened their cases for errors of law. Appellant Mines' first application for Title II and Social Security Insurance ("SSI") benefits was approved by an ALJ but later rejected by the Appeals Council, which reviewed the decision within 60 days pursuant to 20 C.F.R. §§ 404.969, 404.970, 416.1469 and 416.1470. Mines did not appeal. Instead, he filed a second application for disability six months later – which is the subject of this appeal – and was found eligible by a different ALJ on June 25, 1984. The Appeals Council reopened this decision for "good cause" under 20 C.F.R. § 404.989(a)(3) on September 25, 1984, three months after the ALJ decision. The ground for reopening was that the date of onset of disability established by the second ALJ was in direct contradiction of the Appeals Council decision previously rendered. The Appeals Council concluded that the second ALJ had no jurisdiction to

establish a retroactive onset date which the Appeals Council had already rejected.

Appellant Howard received a favorable decision from an ALJ on March 31, 1983, awarding her benefits under Title II and SSI as a disabled child. On March 19, 1984, the Appeals Council reopened and vacated the ALJ's decision on the ground that the evidence before the ALJ was insufficient to establish that Howard met the statutory requirements. Thus, the Appeals Council remanded to a different ALJ for further findings. The second ALJ ruled against Howard on January 30, 1985, and the Appeals Council declined to grant her request for review.

Appellant Roberts was awarded disability benefits under both Title II and SSI, effective on March 14, 1980. He sought and obtained training through the state Department of Vocational Rehabilitation, and was able to begin work on June 1, 1982. The Appeals Council re-evaluated his disability status and determined it had ceased in January 1982 and that his period of entitlement to disability benefits ended in March 1982.

On July 30, 1982, an ALJ determined that Roberts was eligible for benefits through July 1982. The ALJ also held that May 1982 was the ninth month of a trial work period and that following the completion of the trial work period, he was entitled to an extended period of eligibility through August 1984. On June 27, 1985, nearly three years after the ALJ's ruling, the Appeals Council reopened the case because it alleged the ALJ had misinterpreted the pertinent regulations. Based on a correct

interpretation of the regulations, the Appeals Council found Roberts' benefits ended in May 1982.

II

Appellants challenged the decisions of the Appeals Council in district court, arguing the Appeals Council did not have jurisdiction after 60 days from the date of the ALJ's decision to reopen the decisions of the ALJs for errors of law. The court concluded the Appeals Council did have jurisdiction. Appellants appeal the issue of whether the Appeals Council had jurisdiction to reopen the decisions of the ALJs for errors of law pursuant to 20 C.F.R. §§ 404.988, 404.989, 416.1488 and 416.1489.

The circuits are split on this issue. We adopt the majority view that legal error may constitute good cause for reopening. *Sheppard v. Sullivan*, 906 F.2d 756, 759 (D.C. Cir. 1990); *Fox v. Bowen*, 835 F.2d 1159, 1163-64 (6th Cir. 1987); *Munsinger v. Schweiker*, 709 F.2d 1212, 1215-16 (8th Cir. 1983). *Contra Gutierrez v. Bowen*, 898 F.2d 307, 311 (2nd Cir. 1990); *see Hale v. Sullivan*, 934 F.2d 895, 897 (7th Cir. 1991). We conclude the Appeals Council correctly reopened, for errors of law, the final decisions of the ALJs in the cases before us.

The Department of Health and Human Services' regulations authorize the Appeals Council to initiate direct "review" of an ALJ's disability determination within sixty days of the date of a hearing decision or dismissal. 20 C.F.R. §§ 404.969 and 416.1469. The regulations expressly provide the Appeals Council may "review" a case within 60 days for errors of law. 20 C.F.R. §§ 404.970(a)(2) and 416.1470(a)(2).

The regulations, however, also authorize the Appeals Council to "reopen" a case after 60 days for, among other things, "good cause." Section 404.988 provides:

> A determination, revised determination, decision, or revised decision may be reopened . . .
> (b) Within four years of the date of the notice of the initial determination if we find good cause, as defined in § 404.989, to reopen the case . . .

20 C.F.R. § 404.988(b). Similarly, section 416.1488 states:

> A determination, revised determination, decision, or revised decision may be reopened . . .
> (b) Within two years of the date of the notice of the initial determination if we find good cause, as defined in § 416.1489, to reopen the case . . .

20 C.F.R. § 416.1488(b).

"Good cause" for reopening, as it is relevant to this decision, exists if "[t]he evidence that was considered in making the determination or decision clearly shows on its face that an error was made." 20 C.F.R. §§ 404.989(a)(3) and 416.1489(a)(3). Appellants contend "errors on the face of the evidence" allows reopening after the 60 day review period provided by 20 C.F.R. §§ 404.970(a)(2) and 416.1470(a)(2) only when *factual* errors appear in the record.[1] They urge that each of their cases were reopened for errors of law which are not "errors on the face of the

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[1] Initially, Appellants argue the Appeals Council is without authority to reopen a case after 60 days. They argue that allowing the Appeals Council to reopen a case after 60 days would be a violation of due process. This circuit has already held the Appeals Council practice of reopening a case after 60 days is not a violation of due process. *Overend v. Sullivan*, 879 F.2d 673, 675 n.2 (9th Cir. 1989).

evidence." The Secretary of Health and Human Resources ("Secretary") argues, on the other hand, that errors of law are "errors on the face of the evidence" within the meaning of sections 404.989(a)(3) and 416.1489(a)(3).

The district court's grant of summary judgment is reviewed *de novo*. *Overend v. Sullivan*, 879 F.2d 673, 674 (9th Cir. 1989). The Secretary's interpretation of the regulations generally is given great deference. *Schweiker v. Gray Panthers*, 453 U.S. 34, 43-44 (1981). This principle is not, however, absolute. A court need not accept an agency's interpretation of its own regulations if that interpretation is inconsistent with the wording of the regulation or inconsistent with the statute under which the regulations were promulgated. *See United States v. Larionoff*, 431 U.S. 864, 872-73 (1977).

We decided this issue by implication in *Overend* where we said, "The ALJ's legal error in incorrectly attributing 1980 wages to Overend's 1978 wage base was an error clear on the face of the documents in the record and constituted 'good cause' for reopening under §§ 404.988(b) and 404.989(a)(3)." *Overend*, 879 F.2d at 676. As authority for this conclusion, we cited *Fox*, 835 F.2d at 1163, widely regarded as a leading case on this issue. Because counsel alleges our holding in *Overend* is unclear, we now erase any doubt and hold that the Appeals Council may reopen, for an error of law, a decision of an ALJ pursuant to the sections at issue.

The Social Security Administration's Programs Operation Manual interprets the regulations:

> An *error on the face* of the evidence exists where it is *absolutely clear* that the determination or

> decision was incorrect. That is, based on all the evidence in the file and any evidence of record anywhere in SSA at the time the determination or decision was made, it is unmistakably certain that the determination or decision was incorrect.
>
> * * *
>
> A determination or decision which was reasonable on the basis of the evidence in the file and the statute, regulations, instructions, precedents, etc., existing at the time the determination or decision was made, will not be reopened merely for the following reasons:
>
> There is a shift in the weight of the evidence; or A different inference is now drawn from the evidence; or A different rule of law would now be applied; or The statute or regulations have been amended, unless the amendment specifically provides for reopening.
>
> In such cases, there is no error on the face of the evidence on which the determination or decision was based (i.e., the "record") which would permit reopening.

Programs Operation Manual GN. 04010.020 (March 1985) (citation omitted).

Appellants point to 20 C.F.R. §§ 404.989(b) and 416.1489(b) for the argument that the Secretary may not reopen for errors of law. These sections provide, however, that "good cause" to reopen does not exist "if the only reason for reopening is a *change* of legal interpretation or administrative ruling upon which the determination or decision was made." 20 C.F.R. §§ 404.989(b) and 416.1489(b) (emphasis added). The Programs Operation Manual does not preclude reopening to revise an ALJ's

determination which was "based upon the application of an incorrect legal standard or the misinterpretation of law existing at the time of the determination." *Munsinger*, 709 F.2d at 1216. The regulations prohibit reopening based upon a *change* in legal interpretation because in such a case the evidence does not show error clearly on its face. However, when the ALJ applies an incorrect legal standard or misinterprets the law existing at the time the decision was reached, then "it may fairly be said that '[t]he evidence that was considered in making the determination or decision clearly shows on its face that an error was made.' " *Munsinger*, 709 F.2d at 1216 (quoting 20 C.F.R. § 404.989(a)(3) (1981). Based on our reading of the relevant regulations, we conclude that the Secretary's interpretation of them is sound.

We therefore hold that the Appeals Council can reopen a final decision of an ALJ for errors of law pursuant to 20 C.F.R. §§ 404.988, 404.989, 416.1488, and 416.1489 (1992).

AFFIRMED.

THIS CONSTITUTES NOTICE OF ENTRY
AS REQUIRED BY FRCP, RULE 77(d).

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

ROBERT A. MINES, *et al.* Plaintiffs, v. OTIS R. BOWEN, Secretary, Department of Health and Human Services, Defendant.	CV 85-3565 TJH OPINION AND ORDER (Filed June 19, 1989)

BACKGROUND

Plaintiffs, Robert Mines, Carolyn J. Howard and Gary Roberts seek disability benefits from the Social Security Administration, under Social Security Title II, (Old Age, Survivors, Disability Benefits), XVI (Supplemental Security Income) and XVIII (Medicare), Title XVI and Title XVII Programs, and, as class representatives, challenge the administrative review policies of the defendant, Otis R. Bowen, the Secretary of the Department of Health and Human Services ("Secretary").

Although the initial determination and preliminary review procedures differ for claimants for benefits under Titles II, XVI and XVIII, the subsequent hearing procedure for all three groups is before Social Security Administrative Law Judges ("ALJ"). From the hearing stage on, through Appeals Council review and judicial review in the federal district court, the appeals process is

substantially the same for all three of these Social Security Act programs.

The review process for receiving benefits begins with an initial determination of a claimant's case. If the claimant is not satisfied with that determination, he or she may file for reconsideration of that initial determination. If the claimant is still dissatisfied with the result, he or she may appeal to the ALJ. If the claimant wishes to further challenge the ALJ's resolution of his or her claim, the claimant may seek review by the Appeals Council. Finally, after claimant has exhausted this administrative process, and is still dissatisfied with the result, he or she may request district court review of the claim.

Each plaintiff in this action received a favorable determination by an ALJ in his or her claim for benefits from the Administration. Instead of requesting review within sixty (60) days of the ALJ decision, 20 C.F.R. § 404.969, the Secretary reopened the claims substantially beyond the sixty-day limit set forth in the review regulations. The Appeals Council reopened Mines's case ninety-two (92) days after the ALJ's favorable determination, reopened Howard's case nearly one year (354 days) after the ALJ's favorable determination, and reopened Roberts's case thirty-one (31) months after the ALJ's favorable decision.

THE APPLICABLE REGULATIONS

The review regulations, 20 C.F.R. §§ 404.969-70, permit the Secretary's Appeals Council to review the ALJ's determination.

§ 404.969 Appeals Council initiates review.

Anytime within sixty (60) days after the date of a hearing decision or dismissal, the Appeals Council itself may decide to review the action that was taken. . . .

§ 404.970 Cases the Appeals Council will review.

(a) The Appeals Counsel will review a case if –

(1) There appears to be an abuse of discretion by the administrative law judge;

(2) There is an error of law;

(3) The action, finding or conclusions of the administrative law judge are not supported by substantial evidence; or

(4) There is a broad policy or procedural issue that may affect the general public interest.

The reopening procedures are contained in 20 C.F.R. §§ 404.987-89.

§ 404.987 Reopening and revising determinations and decisions.

(a) *General.* Generally, if you [the claimant] are dissatisfied with a determination or decision made in the administrative review process, but do not request further review within the stated time period, you lose your right to further review. However, a determination or a decision made in your case may be reopened and revised. After we reopen your case we may revise the earlier determination or decision.

(b) *Procedure for reopening and revision.* You may ask that a determination or decision to which

you were a party be revised. The conditions under which we will reopen a previous determination or decision are explained in § 404.988.

§ 404.988 Conditions for reopening.

A determination, revised determination, decision, or revised decision may be reopened –

(a) Within 12 months of the date of the notice of the initial determination, for any reason;

(b) Within four (4) years of the date of notice of the initial determination, for good cause, as defined in § 404.989, to reopen the case; or

(c) At any time if –

(1) The favorable decision was obtained by fraud or similar fault;

. . . .

(9) It finds that you are entitled to monthly benefits or to a lump sum death payment based on the earnings of a deceased person, and it is later established that: (i) you were convicted of a felony or an act in the nature of a felony for intentionally causing that person's death; . . .

§ 404.989 Good cause for reopening.

(a) We will find that there is good cause to reopen a determination or decision if –

(1) New and material evidence is furnished;

(2) a clerical error in the computation . . . of benefits was made; or

(3) The evidence that was considered in making the determination or decision clearly shows on its face that an error was made.

(b) We will not find good cause to reopen your case if the only reason for reopening is a change of legal interpretation or administrative ruling upon which the determination or decision was made.

THE PARTIES' ARGUMENTS

Plaintiffs contend that only a claimant can reopen a case. They argue that, unlike the review procedures, which specifically provide for the Secretary to initiate the review process, the regulation governing the reopening process provides only for the initiation by the claimant.

They further assert that the other parts of the Appeals Council review and reopening regulations, those provisions dealing with who can initiate the processes, must be read together. They claim that unless the reopening process is limited to claimants, the sixty-day and other requirements of the review process would be rendered meaningless.

The Secretary interprets the regulations to allow the Appeals Council to reopen cases *sua sponte*. The Secretary argues that the regulations concerning reopening do not explicitly prohibit the Appeals Council from reopening. Instead, the regulation tells claimants of the availability of the reopening process. The Secretary further argues that limiting reopening to claimants becomes more unreasonable when one considers the impact of the other parts of 20 C.F.R. § 404.988. In short, the regulations only make sense if both the claimants and the Appeals Council, alike, are allowed to reopen a case.

As an example, the Secretary cites 20 C.F.R. § 404.988(c)(1), which allows reopening where the benefits had originally been "obtained by fraud or similar fault." He asserts that a claimant having committed a fraud would never invoke this provision – it was intended to be for the benefit of the Secretary.

Finally, the Secretary argues that courts generally defer to the Secretary's interpretation of his own regulations unless the interpretation is "plainly erroneous or inconsistent with the regulation." *Razey v. Heckler,* 785 F.2d 1426, 1428 (9th Cir. 1986).

OTHER DECISIONS

While the Ninth Circuit has not addressed whether the Secretary may reopen cases, several appellate and district courts have ruled on this issue. However, there are three different views on how resolve [sic] this problem.

The first view holds that only claimants may initiate reopening. *McCuin v. Secretary of Health and Human Services,* 817 F.2d 161 (1st Cir. 1987); *Hatfield v. Bowen,* 685 F. Supp. 478 (W.D. Pa. 1988); *Silvis v. Heckler,* 578 F. Supp. 1401 (W.D. Pa. 1984); *Everhart v. Bowen,* 694 F. Supp. 1518 (D. Colo. 1987).

The second view would allow the Secretary to reopen cases, but it would limit reopening to the component of the administration that had made the decision or that had the decision properly before it for review. *Butterworth v. Bowen,* 796 F.2d 1379 (11th Cir. 1986).

The final view provides that the procedures set forth in section 404.987 are available to both the claimants and the Secretary. *Zimmerman v. Heckler*, 774 F.2d 615 (4th Cir. 1985); *Cieutat v. Bowen*, 824 F.2d 348 (5th Cir. 1987); *Fox v. Bowen*, 835 F.2d 1159 (6th Cir. 1987); *Munsinger v. Schewiker* [sic], 709 F.2d 1212 (8th Cir. 1983); *Higginbotham v. Heckler*, 767 F.2d 408; (8th Cir. 1985); *Gutierrez v. Bowen*, 702 F. Supp. 1050 (S.D.N.Y. 1989); *Gerstein v. Bowen*, 680 F. Supp. 1200 (N.D. Ill. 1987); and *Wilson v. Heckler*, 617 F. Supp. 899 (D. Mont. 1985).

DISCUSSION

The language of section 404.987(a) is ambiguous. This section states that the claimant loses the right to further review if a review request is not made within the time limits. It then states: "However, a determination or a decision made in your case may be reopened and revised. After we reopen your case we may revise the earlier determination or decision." These two sentences can be certainly be [sic] read to mean that after the sixty-day time limit of the review process has run, a claimant can seek to reopen the case. However, the sentences do not state that only a claimant may reopen the case. Such a reading would not be logical. As the Secretary states, few, if any, of the reasons listed in section 404.988(c) would ever be used by a claimant to reopen a claim.

Further, prior to 1980, the regulations clearly gave the Appeals Council the right to reopen *sua sponte*. *See* 20 C.F.R. §§ 956-57 (1978). The legislative history to the 1980 revision of the regulations states that "no substantive changes have been made," although "several provisions

have been clarified." *See* 45 Fed. Reg. 52078 (1980). Certainly, removing the Appeal Council's power to reopen *sua sponte* would be a substantive change.

Finally, as the Ninth Circuit noted:

> We generally defer to an administrator's interpretation of her own regulations unless it is "plainly erroneous or inconsistent with the regulation." 2 K.C. Davis, *Administrative Law Treatise* § 7:22 at 105-06 (2d ed. 1979). Although these regulations are subject to several interpretations, the Secretary's reading of them is not plainly erroneous.
>
> Congress has afforded the Secretary broad discretion in this area. *See* 42 U.S.C. § 405(a)(1982).

Razey v. Heckler, 785 F.2d 1426, 1428 (9th Cir. 1986).

Plaintiffs seek to represent a class which consists of individuals: (1) who, on or after May 28, 1979, had or will have a claim for benefits under Titles II, XVI or XVIII of the Social Security Act determined favorably (in whole or in part) by an ALJ; (2) whose ALJ decision was not or will not be reviewed by the Appeals Council within sixty (60) days of the date of that decision; and (3) who was not and is not a named plaintiff or class member in any other case which challenges the Appeals Council's review of the ALJ's decision more than sixty (60) days after the date of the decision. However, based upon this Court's conclusion that the Secretary has the right to reopen a case, such a class action is moot.

ORDER

IT IS ORDERED that plaintiffs' motions for class certification and summary judgment be, and hereby are, denied.

IT IS FURTHER ORDERED that, *sua sponte*, summary judgment for the defendant be, and hereby is, granted.

Date: June 19, 1989

/s/ Terry J. Hatter, Jr.
Terry J. Hatter, Jr.
United States
District Judge

Supreme Court, U.S.
FILED
JUN 1 1993
OFFICE OF THE CLERK

No. 92-1489

In the Supreme Court of the United States

OCTOBER TERM, 1992

ROBERT A. MINES, CAROLYN J. HOWARD AND GARY ROBERTS, ETC., PETITIONERS

v.

DONNA E. SHALALA, SECRETARY OF HEALTH AND HUMAN SERVICES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

The Secretary of Health and Human Services has promulgated regulations which authorize the Appeals Council of the Social Security Administration to reopen a case within specified time limits after expiration of the otherwise applicable review period if "[t]he evidence that was considered in making the determination or decision clearly shows on its face that an error was made."

The question in this case is whether the regulations authorize such reopening when it is clear from the face of the evidence that an error of law, rather than of fact, has been made.

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In the Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-1489

ROBERT A. MINES, CAROLYN J. HOWARD AND GARY ROBERTS, ETC., PETITIONERS

v.

DONNA E. SHALALA, SECRETARY OF HEALTH AND HUMAN SERVICES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-8a) is reported at 981 F.2d 1068. The order of the district court (Pet. App. 9a-17a) is reported at 715 F. Supp. 293.

JURISDICTION

The judgment of the court of appeals was entered on December 15, 1992. The petition for a writ of certiorari was filed on March 12, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. This case involves claims for disability and supplemental security income benefits pursuant to Title II and Title XVI of the Social Security Act, 42 U.S.C. 401 *et seq.*, and 42 U.S.C. 1381 *et seq.* The administrative procedures for such claims begin with an initial determination made upon receipt of an application for benefits and an opportunity for reconsideration of that initial determination. 20 C.F.R. 404.900(a)(1), 404.902; see also 20 C.F.R. 416.1400(a)(1), 416.1402, 404.921, 416.1421.[1] The decision upon reconsideration is binding unless the claimant requests an evidentiary hearing before an Administrative Law Judge (ALJ). See 20 C.F.R. 404.905; 20 C.F.R. 416.1405; see also 20 C.F.R. 404.907, 404.933; 20 C.F.R. 416.1407, 416.1433. A claimant dissatisfied with an ALJ's decision may, within 60 days (subject to extension for good cause), seek review by the Appeals Council of the Social Security Administration. 20 C.F.R. 404.967-404.968; 20 C.F.R. 416.1467-416.1468. Alternatively, the Appeals Council may itself decide, within 60 days, to review the ALJ's decision. 20 C.F.R. 404.969; 20 C.F.R. 416.1469.[2] See generally *Bowen* v. *City of New York*, 476 U.S. 467, 471-472 (1986).

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[1] The administrative procedures for Titles II and XVI are set forth at Subpart J of Part 404, 20 C.F.R. 404.900 *et seq.*, and Subpart N of Part 416, 20 C.F.R. 416.1400 *et seq.*, respectively. To the extent pertinent to this case, the two procedures are virtually identical, except that under Title II a decision can be reopened for "good cause" within four years from the initial determination, see 20 C.F.R. 404.988(b), whereas under Title XVI a decision may be reopened within two years of the initial determination, see 20 C.F.R. 416.1488(b).

[2] The Appeals Council will generally review cases presenting abuse of discretion or error of law; actions, findings, or conclusions not supported by substantial evidence; or broad policy or

While the regulations provide that ALJ decisions not reviewed within 60 days generally become final, certain decisions may be "reopened" after that 60-day period has expired—up to four years after "the initial determination"[3]—upon a finding of "good cause." As pertinent here, "good cause" is defined to include a determination that "evidence that was considered in making the determination or decision clearly shows on its face that an error was made." 20 C.F.R. 404.989(a)(3); 20 C.F.R. 416.1489(a)(3).[4] The Social Security Administration's Program Operations Manual System (POMS) further explains that such an error on the face of the evidence exists when it is "absolutely clear" or "unmistakably certain" that the determination was incorrect, but does not exist when the determination was reasonable when made based on the available evidence and the law as it

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procedural issues which may affect the public interest. 20 C.F.R. 404.970(a)(1)-(4); 20 C.F.R. 416.1470(a)(1)-(4).

[3] Thus, the time limits applicable to reopening begin to run before the time periods applicable to review of ALJ decisions. In many cases, the time consumed by the administrative process after an initial determination (which triggers the deadline for reopening) but before an ALJ renders a decision (which triggers Appeals Council review) can be substantial. We are advised by the Department of Health and Human Services that it is not uncommon for 18 months to elapse between an initial determination and a decision by an ALJ. In view of the different schedules involved, a substantial part of the two-year and four-year periods applicable to reopening may pass before an ALJ renders a decision.

[4] "Good cause" also includes the discovery of "[n]ew and material evidence," 20 C.F.R. 404.989(a)(1); 20 C.F.R. 416.1489 (a)(1), or of a "clerical error," 20 C.F.R. 404.989(a)(2); 20 C.F.R. 416.1489(a)(2). The regulations expressly provide that "good cause" will not be established by "a change of legal interpretation or administrative ruling upon which the determination or decision was made." 20 C.F.R. 404.989(b); 20 C.F.R. 416.1489(b).

then existed; thus, under POMS reopening is not allowed merely to draw different inferences from the evidence or to apply new law to the facts. Pet. App. 6a-7a (emphasis omitted); see also POMS at 04010.020 (1988).

2. Petitioners each received favorable ALJ decisions. Pet. App. 2a. In each instance, the case was reopened by the Appeals Council for "good cause," on the ground that the evidence that was considered clearly showed on its face that an error had been made. In each instance, the ALJ decision finding the claimant disabled was set aside by the Appeals Council. *Id.* at 2a-4a. Petitioners then challenged the Appeals Council's decisions in the United States District Court for the Central District of California, asserting that only a claimant (and not the Secretary) may seek to reopen a decision for "good cause" under the regulations. *Id.* at 13a. The district court rejected that contention and denied petitioners' motions for class certification and for summary judgment. *Id.* at 15a-17a. Deferring to the Secretary's interpretation of the regulations, the court granted summary judgment to the Secretary. *Id.* at 16a-17a.

3. The court of appeals affirmed. Pet. App. 1a-8a. The court first rejected petitioners' contention that the "errors on the face of the evidence" that establish "good cause" to reopen under the regulations are limited to factual, as distinguished from legal, errors. *Id.* at 4a-5a. The court reasoned that the Secretary's interpretation—that clear errors of law may appear on the face of the evidence—was entitled to "great deference," *id.* at 6a, and noted that the Ninth Circuit had previously treated such legal errors as "good cause." *Ibid.* (citing *Overend* v. *Sullivan*, 879 F.2d 673, 676 (9th Cir. 1989)). While apparently reading Second and Seventh Circuit decisions as taking a different view, the court "adopt[ed] the majority view that legal error may constitute good cause for reopening." Pet. App. 4a.

The court of appeals next rejected petitioners' claim that reopening by the Appeals Council after the 60-day review period "would be a violation of due process." Pet. App. 5a n.1. The court explained that its decision in *Overend v. Sullivan*, *supra*, had already "held the Appeals Council practice of reopening a case after 60 days is not a violation of due process." Pet. App. 5a n.1.

ARGUMENT

1. Petitioners contend that the Appeals Council should not be allowed to "reopen a decision favorable to a claimant months or years after the normal 60-day review period is over, and to revise the decision based upon the Council's different view of the law." Pet. 9-10. However, petitioners do not contend, as indeed they cannot, that the text of the regulations precludes the actions taken by the Secretary. Indeed, they do not so much as attempt *any* textual analysis of the regulations. They simply argue, in effect, that any interpretation of the regulations that reduces "finality" in any way is impermissible. Pet. App. 10, 14-15. Petitioners' contentions do not warrant review.

The language of the regulations—requiring that evidence "clearly show[] on its face that an error was made"—plainly encompasses situations when an examination of the evidence considered readily shows that an obvious error of law was committed in reaching the decision in question. Because the plain language of the regulations demonstrates the correctness of the court of appeals' decision, petitioners' argument must fail. In any event, the Secretary's interpretation at the very least represents a reasonable construction of the language of the regulations, and therefore her interpretation is entitled to controlling weight under this Court's cases. See, *e.g.*, *United States* v. *Larionoff*, 431 U.S. 864, 872-873 (1977).

The question presented by petitioners does not encompass whether the Appeals Council has the authority to reopen at all at the instance of the Secretary, but only whether it may do so "*for an error of law*." See Pet. i (emphasis added). And petitioners do not contend in the body of the petition that, as a matter of law, the Appeals Council may reopen a decision only at the instance of a claimant. However, petitioners note that *McCuin* v. *Secretary of Health & Human Services*, 817 F.2d 161 (1st Cir. 1987), held that "due process guarantees prohibit the Appeals Council from reopening ALJ decisions," Pet. 13, and they cite *McCuin* in support of a broad policy argument to the effect that "finality" is favored by "traditional notions of jurisprudence," Pet. 10, and to illustrate the purported lack of uniformity of the law in this general area. Pet. 13-14. Because petitioners do not as much as endorse (much less attempt to defend) the reasoning or holding of *McCuin*, this case would be a poor candidate to resolve the issue decided by the First Circuit in that case.

In any event, to the extent petitioners' citation to *McCuin* is meant to suggest that due process precludes reopening under *any* circumstances (Pet. 12-13), their argument conflicts with this Court's rejection of the notion that due process has a "fixed content unrelated to time, place and circumstances." *Mathews* v. *Eldridge*, 424 U.S. 319, 334 (1976). As the District of Columbia Circuit has explained:

> [R]eopening by the Appeals Council seems to us properly viewed simply as a late stage in a single proceeding. * * * [T]he problem seems primarily one of timing and degree. It seems doubtful that the First Circuit would have been concerned by a six-month window, and we surely would be troubled by one of 50 years. Although four years is a long time for a claimant to have a benefit payment hang in

> limbo * * * it is not so different from the insecurity faced by the average litigant, even if we confine the comparison to the period between trial court judgment and disposition on appeal.

Sheppard v. *Sullivan*, 906 F.2d 756, 760 (1990). See also *Overend* v. *Sullivan*, 879 F.2d at 675 n.2. Because the First Circuit decision cited by petitioners is aberrational and clearly wrong, and has been disavowed by other circuits, the First Circuit can be expected to reconsider it in due course without this Court's intervention.

There is no greater merit to petitioners' contention that review is warranted because the Second and Seventh Circuits "have found, in direct opposition to the court below, that only factual, and not legal, error may form the basis for a good cause reopening." Pet. 11. Although the court of appeals intimated—without explanation—that there was some tension between its conclusion and the two cases cited by petitioners (Pet. App. 4a), those cases do not conflict with the decision below. Indeed, neither case supports the broad proposition advanced by petitioners.

In the first case, *Gutierrez* v. *Bowen*, 898 F.2d 307 (1990), the Second Circuit held that the claimant's case could not be reopened to reassess the credibility of a witness, *id.* at 311-312, or to apply to the claimant a "new legal interpretation" of a regulation that specified when money in a bank account may be deemed the property of the account holder. *Id.* at 310-311 & n.4. Thus, in the Second Circuit's view, the grounds cited for reopening simply did not show a "clear" error, factual *or* legal. Similarly, in *Hale* v. *Sullivan*, 934 F.2d 895 (1991), the Seventh Circuit concluded that the Appeals Council may not merely "reassess[] the ALJ's findings" to conclude that a claimant is "not disabled." *Id.* at 897. Like *Gutierrez*, *Hale* stands for the unremarkable proposition

that no "clear" error of any type is shown when the Appeals Council simply disagrees with the weight assigned to the evidence by the ALJ.[5]

In sum, petitioners have cited no court of appeals decision which actually holds that the Appeals Council may not reopen for "good cause" when the evidence clearly shows on its face that a legal error has been made. On the other hand, as the court of appeals noted, four circuits have expressly held that the Appeals Council may reopen on such a basis. See *Sheppard* v. *Sullivan*, 906 F.2d at 758-759; *Overend* v. *Sullivan*, 879 F.2d at 675-676; *Fox* v. *Bowen*, 835 F.2d 1159, 1163-1164 (6th Cir. 1987); *Munsinger* v. *Schweiker*, 709 F.2d 1212, 1214-1216 (8th Cir. 1983). Because the court of appeals' decision on this point is consistent with every case that has considered the question, review is not warranted.

2. Petitioners also contend that review is warranted because "[i]f reopening is allowed for both factual and legal error, there is no case for which reopening could not occur," a result that in petitioners' view "renders meaningless the [60-day] review procedure." Pet. 15. That argument, however, mischaracterizes the standards governing reopening under the Secretary's regulations. Those regulations do not provide that "any" error (Pet. 15) constitutes "good cause," but only that "absolutely clear" or "unmistakably certain" (Pet. App.

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[5] The last case cited by petitioners as "conflicting" with the decision below, *Butterworth* v. *Bowen*, 796 F.2d 1379, 1386 (11th Cir. 1986), is inapposite. The reopening challenged in *Butterworth* was under 20 C.F.R. 404.988(a), see 796 F.2d at 1382 n.3, which provides for reopening within 12 months "for any reason." Accordingly, the court of appeals had no occasion to consider the issue presented in this case—whether the Secretary can reopen within four years for "good cause" under 20 C.F.R. 404.988(*b*)—where the evidence clearly shows on its face that a legal error had been made.

6a-7a (emphasis omitted)) factual or legal errors do. The focus of the "good cause" exception (as applied by the Secretary here) therefore is not on the factual or legal character of the asserted error, but on its obviousness. Thus, contrary to petitioners' intimation, the "good cause" exception applies to a relatively small class of cases in which glaring errors have been committed—an escape valve that hardly renders the ordinary review procedure that applies to the more usual cases "meaningless."

Furthermore, although in this case the regulations were invoked to reopen decisions finding the three petitioners disabled, the regulations also permit reopening of decisions finding the claimant not disabled. Contrary to petitioners' contention, then, the regulations protect the interests of claimants, as well as the public interest in preventing payment of benefits to individuals who are clearly ineligible.[6]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JUNE 1993

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[6] Moreover, if a claimant has already begun to receive benefits under a decision that is subsequently set aside upon reopening, recoupment of the overpayments may be waived on equitable grounds. See *Sullivan* v. *Everhart*, 494 U.S. 83 (1990).

Supreme Court, U.S.
FILED
JUN 9 1993
OFFICE OF THE CLERK

No. 92-1489

In The

Supreme Court of the United States

October Term, 1992

ROBERT A. MINES, CAROLYN J. HOWARD, GARY ROBERTS, and a class of persons similarly situated,

Petitioners,

v.

DONNA SHALALA, Secretary of the Department of Health and Human Services,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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REPLY BRIEF FOR THE PETITIONER

The respondent Secretary of Health and Human Services opposes the request for *certiorari*, boldly suggesting that there is not a conflict among the circuits on the issue presented for review. In fact, four circuits are in sharp conflict with the decision below; they do not merely present different legal theories for the same result, but actually apply three *completely different policies* to a common circumstance, which affects thousands of persons each year.

1. The Secretary does not contend that the First Circuit is in accord with the decision below. She admits

that *McCuin v. Secretary of Health & Human Services*, 817 F.2d 161 (1st Cir. 1987) stands in contrast to the three court of appeals decisions upon which she relies.[1] Nevertheless, she dismisses that case as "aberational and clearly wrong," claiming that "the First Circuit can be expected to reconsider it in due course without this Court's intervention." Brief for Respondent at 7.

The Secretary charges that petitioners do not endorse or defend the reasoning of *McCuin* (Resp. Br. 6), but that is irrelevant and is not the purpose of a Petition for Review.[2] Rather, Petitioners cited *McCuin* to demonstrate the diverse views in the circuits. The First Circuit's *McCuin* decision and policy is extremely different from the Secretary's position, and this regional disparity is admitted by respondent.

2. The Secretary simply hides from the holdings in the three other circuit opinions[3] which reject her view, pretending that there is no other conflict. She suggests

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[1] *Sheppard v. Sullivan*, 906 F.2d 758 (D.C. Cir. 1990); *Fox v. Bowen*, 835 F.2d 1159 (6th Cir. 1987); *Munsinger v. Schweiker*, 709 F.2d 1212 (8th Cir. 1983).

[2] In a similar vein, the Secretary states that petitioners "do not contend . . . that the text of the regulations precludes the actions taken by the Secretary," or attempt "any textual analysis of the regulations." Resp. Br. 5. Petitioners do believe that the regulations preclude the Secretary's actions. That is not, however, the basis for the petition which presents the circuit-wide conflict and the analyses of the law used by these appellate courts. As respondent is well aware, petitions for review are appropriately limited in scope.

[3] *Gutierrez v. Bowen*, 898 F.2d 307 (2d Cir. 1990); *Hale v. Sullivan*, 934 F.2d 895 (7th Cir. 1991); *Butterworth v. Bowen*, 796 F.2d 1379 (11th Cir. 1986).

that the Ninth Circuit "intimated – without explanation – that there was some tension between its conclusion" and two of the cases. Resp. Br. 7. The Ninth Circuit, however, more than intimates a tension, as it bluntly states that "[t]he circuits are split on this issue." Pet. App. at 4a; *Mines v. Sullivan*, 981 F.2d 1068, 1069 (9th Cir. 1992).

The Secretary mischaracterizes the holdings of both *Gutierrez v. Bowen*, 898 F.2d 307 (2d Cir. 1990), and *Hale v. Sullivan*, 934 F.2d 895 (7th Cir. 1991), as well as the import of *Butterworth v. Bowen*, 796 F.2d 1379 (11th Cir. 1986). Although respondent attempts to recharacterize both the *Guitierrez* and *Hale* decisions, claiming that they do not stand for the proposition that a case cannot be reopened for legal error, the language of the Second and Seventh Circuit opinions shows otherwise. In *Guitierrez*, 898 F.2d at 311, the Second Circuit clearly states: "Accordingly, if the Appeals Council's legal disagreement with the A.L.J.'s ruling was the sole reason for reopening, the case should not have been reopened." This language puts to rest the Secretary's assertion regarding *Gutierrez*. The Second Circuit prohibits reopening for legal error.

Similarly, the Secretary mischaracterizes the holding in *Hale v. Sullivan*. In *Hale* the Seventh Circuit stated:

> The district judge concluded that the Appeals Council possessed good cause to reopen Hale's case because he believed the case involved simply a recomputation of benefits. But the Appeals Council's decision was not founded upon a clerical error in the computation of benefits or an error on the face of the evidence. Instead, the Appeals Council re-assessed the ALJ's findings and issued its own determination that Hale was

> not disabled. *This type of change in administrative judgment does not amount to good cause to reopen a case under the regulations.*

934 F.2d at 897 (emphasis added). This language shows that the court was contrasting a clerical error, or clear factual error on the face of the evidence (which would allow for reopening), with a change in legal judgment, a legal error, for which reopening is prohibited. Thus, the Secretary's attempt to recharacterize the grounds in *Hale* as merely not showing "clear" error, as opposed to factual error, fails. In short, both *Hale* and *Guttierrez* disallow reopening for legal error.

3. Most disingenuously, the Secretary attempts to distinguish in a footnote the case applying a "component analysis" to the reopening regulations, *Butterworth v. Bowen*, 796 F.2d 1379, 1386 (11th Cir. 1986). Resp. Br. 8 n.5. *Butterworth*, the Secretary claims, is "inapposite" because the reopening in that case was brought under 20 C.F.R. § 404.988(a) and not under § 404.988(b), the good cause part of the reopening regulations. Although it is true that the reopening in that case was brought under a different part of the regulation than the current case, it is not true that the case is, therefore, "inapposite." The reasoning of the Eleventh Circuit applies to *all cases* of *reopening* brought under the regulations set forth in 20 C.F.R. §§ 404.987 and 404.988, 416.1487 and 416.1488. The Secretary's distinction is meaningless since it was not made by the court and has not been so interpreted in that circuit. More important, respondent has herself recognized the broad impact of the *Butterworth* decision in her own policy. Acquiescence Ruling (AR) 87-2(11), effective May 1, 1987, applies the *Butterworth* ruling to all of the cases in

the Eleventh Circuit states, and does not take the narrow view now espoused by the Secretary. The ruling states expansively:

> Where an ALJ's decision has become final (i.e., the 60-day time limit for appealing to the Appeals Counsel has expired, and the claimant has not appealed and the Appeals Council has not initiated own motion review within the 60-day time limit), the Appeals Council may not reopen and revise the ALJ's decision since the ALJ's decision is not considered to be properly before the Appeals Council.

By merely noting the distinction without import, respondent fails to address that the Secretary's position in this case has not been adopted by the Eleventh Circuit, and that citizens in that region are subject to a policy which is severely at odds with the Secretary's position in this litigation. Whether the Social Security Administration may reopen for good cause in the Eleventh Circuit depends upon at what administrative level the case currently resides. *Butterworth*, 796 F.2d at 1379.

Thus, the First, Second, Seventh and Eleventh Circuits have all adopted policies which are contrary to the decision below, and thus to the decisions of the District of Columbia, Sixth and Eighth Circuits. A decision from this Court would provide much-needed guidance to the lower courts, as well as to the Social Security and Medicare recipients themselves.

CONCLUSION

For the reasons stated, the petition for writ of certiorari should be granted.

Respectfully submitted,

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June 1993